TAN YOKE KEE

v.

CIMB SECURITIES SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN JC
[CIVIL SUIT NO: D5-22-575-1996]
10 MARCH 1997

CIVIL PROCEDURE: *Res judicata - Conditions to be fulfilled - Same cause of action - Same parties*

CIVIL PROCEDURE: *Pleadings - Striking out - Striking out writ - Whether defendant's entering of unconditional appearance a bar to applying to strike out plaintiff's writ - Rules of the High Court 1980, O. 18 r. 19*

The plaintiff was the defendant in an earlier suit ('the first suit') brought by the first defendant, a stock broking firm, against her for the sum of RM774,920.29 in respect of shares purchased in the plaintiff's name. The plaintiff entered appearance. The first defendant applied for and obtained summary judgment. The plaintiff did not appeal.

In this suit, the plaintiff sought to recover the judgment sum of the first suit from the defendants. She averred that the second defendant who was her husband at all material times, had persuaded her to purchase shares through the first defendant and that the first defendant's agent then persuaded her to sign a blank application form to open an account through which she could purchase shares. She averred that she had never placed any orders with the defendants and was therefore surprised when judgment in default was entered against her in the first suit. She alleged that she only became aware of the judgment when a bankruptcy notice was served on her on 2 August 1995. She therefore filed this suit to seek recovery of the sum from the defendant. The first defendant herein applied to strike out the writ under O. 18 r. 19(1) of the Rules of the High Court 1980 ('the RHC') on the ground that the plaintiff's action was *res judicata* as it involved the same subject matter and same parties as the first suit, for which no appeal was filed. The plaintiff's counsel argued that the first defendant was estopped from filing this striking out application as it had entered an unconditional appearance. The senior assistant registrar dismissed the application and the first defendant has appealed.

Held:

[1] The parties in the first suit and the present one were the same and the cause of action was the same. As judgment had already been entered against the plaintiff and there was no appeal, the plaintiff was bound to the earlier judgment and *res judicata* clearly applied.

[2] The first defendant was not estopped from filing the application merely because it had entered unconditional appearance as O. 18 r. 19(1) allowed the court to enter an application made under that Order at any stage of the proceedings.

[Appeal allowed.]

Cases referred to:
Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 ***(foll)***
Richland Trade & Development Sdn Bhd & Ors v. United Malayan Banking Corp Bhd [1996] 4 MLJ 233 ***(cit)***
The MV IRA [1996] 4 MLJ 109 ***(dist)***

Legislation referred to:
Rules of the High Court 1980, O. 18 r. 19(1)(a), (b), (c) & (d)

For the plaintiff - CG Chew; M/s Riza Leong & Partners
For the 1st defendant - HT Ting; M/s Amin Tan & Co

Reported by Anne Khoo

JUDGMENT

RK Nathan JC:

The plaintiff in her statement of claim pleaded that the 2nd defendant who was her husband at all material times, persuaded her to purchase stocks and shares through the 1st defendant. The 1st defendant's agent then persuaded her to sign a blank application form for the purpose of opening an account and that if the plaintiff so intended to purchase the stocks and shares through the 1st defendant, she could give the 1st defendant instructions. The plaintiff then signed the said form. Since then the plaintiff had no further dealings whatsoever with the defendants. She was surprised when judgement in default was entered against her for the sum of RM774,920.29 in Civil Suit No. D1-22-13-1995 (the D1 suit). The first time that she became aware of this was when a bankruptcy notice for the said sum was served on her on 2 August 1995. She contended in her claim that she had never placed any orders with the defendants and that such purchases were done by the 1st defendant in collusion with the 2nd and 3rd defendants. She therefore filed this suit on 23 August 1996 to recover

the said sum of RM774,920.29 obtained against her in the D1 suit with costs and interest.

The 1st defendant having entered appearance applied by way of summons (encl. 4) to strike out the writ under O. 18 r. 19(1)(a), (b), (c) and (d) of the Rules of the High Court 1980 (the RHC) with costs. The affidavit in support of the application to strike out (encl. 3) was affirmed by the 1st defendant's retail business manager. The 1st defendant exhibited a copy of the D1 suit wherein the 1st defendant herein was the plaintiff and the plaintiff herein, the defendant.

The D1 suit shows that the plaintiff had purchased various shares at the request of the defendant to the value of RM745,216.42. To that was added interest at 12% per annum up to 6 February 1995 which amounted to RM29,703.87, making a total of RM774,920.29. The said D1 suit was served on the defendant on 23 March 1995. The defendant entered appearance. The plaintiff then took out an application for summary judgment and the same was fixed for hearing on 9 March 1995. After hearing arguments the said order was granted and judgment entered against the defendant for the sum of RM774,920.29 with interest at 12% per annum from 7 February 1995 up to date of settlement and costs of RM350. The 1st defendant in this case averred that the plaintiff herein did not appeal against that judgment and that since this claim evolves upon the same subject matter, and against the same parties, the issue of *res judicata* ought to prevail against the plaintiff herein.

Further it was submitted that if the plaintiff herein had a valid claim the plaintiff ought to have raised it in the D1 suit.

The learned Senior Assistant Registrar who heard the 1st defendant's application to strike out the claim dismissed the said application with costs on 31 October 1996. Hence this appeal before me.

The appellant herein relied on O. 18 r. 19(1)(b) and (d) of the RHC and on the affidavit in support of the application and asked for order in terms.

In reply, Mr. Chew for the plaintiff argued that since the 1st defendant had entered an unconditional appearance, the 1st defendant was estopped from filing this application under O. 18 r. 19. In support of this contention he relied on *'The MV IRA'* [1996] 4 MLJ 109.

On the issue of *res judicata* the plaintiff, relying on *Richland Trade & Development Sdn Bhd & Ors v. United Malayan Banking Corp Bhd* [1996] 4 MLJ 233 submitted that even if there was *res judicata* this court had a discretion to ignore it in the interest of justice.

In reply the appellant relied on the effect of r. 19(1) itself which said that the court may at any stage of the proceedings order to be struck out any pleadings.

Court's Findings

I have read the affidavits in support and the cases referred to by both counsel.

Res Judicata

If at all a case falls squarely within the principle canvassed by the then Supreme Court in *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 with regard to the application of *res judicata*, this case before me, fits it to a T. The Supreme Court held that when a matter between two parties has been adjudicated by a court of competent jurisdiction, they and their privies are not permitted to litigate once more the *res judicata*, as the judgment becomes the truth between such parties. An estoppel *per rem judicatum* has been created as a result. It also went on to hold that there are two kinds of estoppel *per rem judicatum*, ie, cause of action estoppel and issue estoppel. The cause of action estoppel prevents reassertion of a cause of action which has been determined in a final judgment by the same parties. On the other hand, the issue estoppel prevents contradiction of the correctness of a final judgment by the same parties in a subsequent proceeding. Further, the parties are also prevented from asserting a cause of action or issue which should have been brought forward in the earlier action, but was not, whether deliberately or inadvertently.

The facts before me are so straight forward that any amplification would merely seem superfluous verbiage. The parties in both the D1 suit and the suit herein are the same. The cause of action is the same. Judgment had already been entered against the plaintiff herein in the D1 suit for the exact sum. There has been no appeal. At least none has been shown to exist. The plaintiff herein is bound by the earlier judgment and *res judicata* clearly applies.

Unconditional Appearance

The reliance of the respondent herein on *'The MV IRA' (supra)* to propose the submission that by filing an unconditional appearance, the 1st defendant is precluded now from relying on O. 18 r. 19 of the RHC is a submission based on a complete misreading and misunderstanding of the said case. That case related to an admiralty action. The rule in admiralty law is that, after conditional appearance has been entered by the defendant, the issue as to whether or not the defendant is liable is a matter for trial. However a defendant who objects to an irregularity in the writ of summons or the service of the

writ or to jurisdiction must, if he wants to raise that ground, enter conditional appearance. In *'The MV IRA',* since the defendant had entered unconditional appearance the court held that it could not raise its objections at that stage of the proceedings.

The case before me is not an admiralty suit. There was no objection raised as to any irregularity in the writ or in its service or as to jurisdiction. How then can the *'The MV IRA'* apply to this case is an enigma to me.

Even otherwise it is my judgment that O. 18 r. 19(1) itself is self-explanatory. The court may at any stage of the proceedings entertain this application. I therefore allowed the appeal with costs.